

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

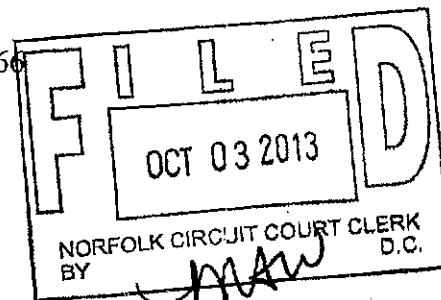
COMMONWEALTH OF VIRGINIA,

v.

CR13000160

BERNELL BENN,

Defendant.



MOTION IN LIMINE

COMES NOW the Commonwealth, through the undersigned Assistant Commonwealth's Attorney, and says unto the Court the following:

Statement of Facts

On August 16, 2012, at about 2:00 p.m., Bernell Benn (hereinafter the defendant) shot and killed Ramon Colorado inside the Rite Aid store located at 3600 Tidewater Drive, in the City of Norfolk. The defendant was indicted for Second Degree Murder in violation of §18.2-32 of the Code of Virginia, as amended, and Use of a Firearm in the Commission of a Felony in violation of §18.2-53.1. On information and belief, the defendant will plead self-defense.

Argument

The defendant should be prohibited from introducing evidence of a prior incident between Mr. Colorado and any third-party which is irrelevant and is not probative of the victim's character for violence.

"Justifiable homicide in self-defense is an affirmative defense based on necessity. ... The right to kill begins where the necessity begins and ends where it ends." Thomason v. Commonwealth, 178 Va. 489, 498-99, 17 S.E.2d 374, 378 (1941). Generally, the "necessity relied upon must not arise out of defendant's own misconduct." McGhee v.

Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978). However, excusable homicide may occur where the accused was at some fault but who, when attacked, retreated as far as possible, announced a desire for peace, and killed from a reasonably apparent necessity to preserve his own life. Smith v. Commonwealth, 17 Va. App. 68, 71, 435 S.E.2d 414, 416 (1993).

Evidence about the victim's character must be relevant to be admissible.

"Relevant evidence means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence."

Virginia Rules of Evidence, R2:401. "Evidence that is not relevant is not admissible."
R2:402.

When the accused relies on a plea of self-defense, alleging the victim was the aggressor, evidence of the victim's character for violence, turbulence or aggression may be introduced to show who was the aggressor or to show reasonable apprehensions of the defendant. Canipe v. Commonwealth, 25 Va. App. 629, 640, 491 S.E.2d 747 (1997). On the question of who was the aggressor, the issue is what the victim probably did, and evidence of recent acts of violence toward third persons ought to be received, if connected in time, place, and circumstance with the crime, as to likely characterize the victim's conduct toward the defendant. Randolph v. Commonwealth, 190 Va. 256, 265, 56 S.E.2d 226, 230 (1949).

The act that a defendant seeks to introduce must be an act of violence. See e.g. Id., at 264, 56 S.E.2d at 230 (holding testimony the victim had assaulted a witness with a gun would have been admissible had there been a question of who was the aggressor); Mealy v. Commonwealth, 135 Va. 585, 596, 115 S.E.2d 528, 531 (1923) (evidence of the

victim's quarrelsome, dangerous, and ferocious character would have been admissible had there been a foundation for a self-defense claim); Harrison v. Commonwealth, 79 Va. (4 Hans.) 374, 379 (1884) (when a claim of self-defense is made, evidence may be admitted showing the victim's brutal and ferocious character).

An act that may be offensive or careless is not violent thus not admissible. See e.g. Short v. Commonwealth, 213 Va. 746, 746-47, 196 S.E.2d 79, 80 (1973) (sexual groping and advances were not violent acts and thus were not admissible under Randolph); Luck v. Commonwealth, 30 Va. App. 36, 44-45, 515 S.E.2d 325, 328-29 (1999) (a victim's prior conviction for reckless handling of a firearm without evidence as to the basis of the conviction was not evidence of violent or turbulent behavior); Orsorio v. Commonwealth, Record 0906-10-4, 2010 Va. App. LEXIS 508, at *13 (Va. Ct. App. October 28, 2010) (testimony that the victim was an aggressive panhandler where there was not assaultive conduct was not admissible).

On information and belief, the defendant will seek to introduce evidence that Ramon Colorado was the aggressor and will seek to introduce prior incidents between Mr. Colorado and third parties including a debate over the "Slutwalk Norfolk" event, protests, and a suicide attempt. The evidence that the Commonwealth believes the defendant seeks to introduce is not evidence of a violent character. It is therefore, not relevant to the question of whether the victim was the aggressor or whether the defendant had reasonable apprehensions of the victim.

The Commonwealth believes the defense will offer evidence of an incident that occurred in X. Mr. Colorado and Ms. Jacqueline Roderick were involved in a debate over the propriety of an event organized by Ms. Roderick called "Slutwalk Norfolk." The

majority of this debate occurred on social media sites. Mr. Colorado was charged with a misdemeanor count of using a computer to harass or intimidate Ms. Roderick. However, the charge was dismissed by agreement and Mr. Colorado publicly apologized for overstepping the bounds of civil debate.

This incident is not a violent act that would tend to prove that Mr. Colorado was the aggressor. Unlike in Randolph, the evidence the defendant seeks to introduce is not that Mr. Colorado assaulted another person but that Mr. Colorado engaged in an impolite public debate. This is simply not an act of violence that was likely to characterize Mr. Colorado's later behavior toward the defendant. Further, the defendant did not know of the incident between Mr. Colorado and Ms. Roderick. Thus this evidence would not show the defendant had reasonable apprehensions of Mr. Colorado because the incident was not violent or turbulent.

Upon information and belief, the defendant will also seek to introduce evidence that Mr. Colorado changed jobs repeatedly, may have been terminated by an employer, that he once threatened to commit suicide outside a Virginia Beach school where he was employed, that he protested at an event held by People for the Ethical Treatment of Animals (PETA), and that he complained about the Norfolk Department of Development.

Again, these actions may have been uncivil or annoying but were not violent. Mr. Colorado's employment history is not relevant to prove he was the aggressor in the confrontation with the defendant and can shed no light on whether the defendant had reasonable apprehensions of Mr. Colorado. Mr. Colorado's voluntary mental health treatment and suicide attempt is also irrelevant and is not an act of violence.

Mr. Colorado's protests against PETA and Norfolk governmental agencies also fail to meet the relevancy test because they fail to show he had a violent character and was likely to be the aggressor in the confrontation with the defendant. Mr. Colorado, in counter-protesting a PETA protest of the circus was within his First Amendment rights just as the animal rights organization's protest was within their First Amendment rights. Shouting slogans and videotaping is not a violent act. Complaining to the Norfolk Department of Development about their social media posts is also within a citizen's First Amendment rights and not an act of violence. Notably, the Norfolk police department when notified of the complaints to the city agency stated they did not consider Mr. Colorado a physical threat.

Any evidence that Mr. Colorado used intemperate language, or obscenities in his protests is irrelevant and does not show he had a violent character. Regrettably, obscenities are commonly used in many areas of social life, including political commentary, entertainment, and ordinary conversation. Actions such as these, which fall under the protection of the First Amendment are not violent actions, thus such action is not relevant and not admissible to prove Mr. Colorado was the aggressor in the encounter with the defendant that cost Mr. Colorado his life.

Prior conduct also must be "sufficiently connected in time and circumstances with the homicide as to be likely to characterize the victim's conduct toward the defendant. Or stated alternatively, the test is whether the evidence of prior character is so distant in time as to be void of real probative value in showing present character" Barnes v. Commonwealth, 214 Va. 24, 26, 197 S.E.2d 189, 190-91 (1973) citing Randolph, 190 Va. 265, 56 S.E.2d at 230; 3A John H. Wigmore, Evidence, § 928, at 755 (Chadbourne

Rev. 1970). The Barnes Court held evidence of the defendant's aggressive behavior while drinking five years before the offense at trial could be considered too remote. Barnes, 214 Va. at 26, 197 S.E.2d at 190-91. But because the evidence at trial showed the victim was intoxicated that night, there was a sufficient nexus of relevancy to admit the evidence of the victim's prior conduct when drinking. Id.

Similarly, Mr. Colorado's attempted suicide occurred in 2008, some four years before the confrontation with the defendant. However unlike the Barnes case, there is no nexus that links Mr. Colorado's prior action to the shooting at the Rite Aide store. Mr. Colorado was not threatening to commit suicide in the pharmacy. Accordingly, Mr. Colorado's prior suicide attempt is too remote in time, is not relevant, and is not admissible to show he was the aggressor or that the defendant had a reasonable apprehension of Mr. Colorado.

Even if the Court were to consider the prior incident between Mr. Colorado and Ms. Roderick was a turbulent act, a single prior violent act is not sufficient to establish that violence was likely to characterize the victim's conduct toward the defendant. See McMinn v. Rounds, 267 Va. 277, 281-82, 591 S.E.2d 694, 697 (2004). In McMinn, a civil assault and battery case which applied the criminal rules of self-defense, the Court held that a series of bad acts may collectively be admissible to establish poor character but the conduct of one incident is insufficient. McMinn, 267 Va. at 282, 591 S.E.2d at 697.

In comparison, the Court had previously held that multiple acts of violence were admissible in Barnes, where the defendant sought to introduce testimony that the intoxicated victim had a drinking problem and aggressive tendencies when intoxicated.

214 Va. at 25, 197 S.E.2d at 190. Similarly, the McMinn Court noted Stover v. Commonwealth, which held that the defendant should have been allowed to introduce evidence that the victims had recently committed acts, not a single act, of violence. McMinn, 267 Va. at 283, 591 S.E.2d at 698 citing Stover, 211 Va. 789, 794, 180 S.E.2d 504, 508 (1971).

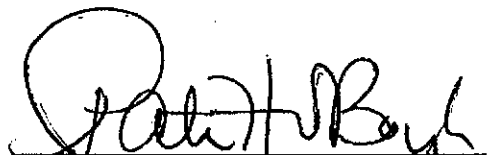
The Commonwealth believes that the defendant will seek to introduce a single incident wherein the victim was involved in an uncivil debate with a third-party. While this debate involved a series of exchanges on social media websites and a non-physical confrontation during the Slutwalk event, these were all part of one debate over a single event and thus would not constitute the multiple acts necessary to show Mr. Colorado had a violent, turbulent, and aggressive character that was likely to characterize his interactions with the defendant.

Protests against a city agency and PETA fall under protected speech and cannot be aggregated with the debate with Ms. Roderick to create multiple acts of violence. Nor can a suicide attempt, which was directed only at himself be considered a violent act sufficient to meet the standard required by Barnes, Stover, and McMinn.

WHEREFORE, the Commonwealth respectfully requests that the Court exclude any evidence of any prior incident between Mr. Colorado and any third party.

Respectfully submitted,

By:


Assistant Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion in Limine was sent to
John D. Levin, Attorney for the Defendant, on the 3 day of October, 2013.


Assistant Commonwealth's Attorney